In the

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Prometheus Radio Project, Petitioner, v. Federal Communications Commission and United States of America, Respondents	)))))))))	No.

MOTION FOR STAY PENDING JUDICIAL REVIEW

Petitioner Prometheus Radio Project, by its attorneys, and pursuant to 28 U.S.C. §2112(a)(4), FRAP 18, and Circuit Rule 18.1, moves for a stay pending judicial review of regulations adopted by Respondent Federal Communications Commission ("FCC" or "Commission") in its *2002 Biennial Regulatory Review*, 68 Fed. Reg. 46286 (Aug. 5, 2003) ("*Order*"). (A copy of the *Order* is provided as Ex. 1A hereto.) Petitioner requests that the stay be issued prior to Sept. 4, 2003, the effective date of the new regulations, or as soon as practical thereafter.[1]

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[1]Petitioner has not sought a stay from the FCC because "moving first before the agency would be impracticable." FRAP 18(a)(2)(A)(i)-(ii). Shortly after the FCC adopted its *Order* by a 3-2 vote, the two dissenting Commissioners asked their colleagues to join them in issuing a stay *sua sponte*. Ex. B. The majority has not acted on that request. Moreover, in the *Order*, the majority denied a request to postpone action until further research could be submitted, *Order* ¶ 638, an emergency motion to postpone voting until the problems with the agency's electronic filing system problems were resolved, *id.* n. 1323, and took no action on a request to postpone the effective date of the rules until after reconsideration. Ex. C. In light of these factors, filing a stay request would be an "exercise of futility." *See Commonwealth-Lord Joint Venture v. Donovan*, 724 F.2d 67, 67 (7th Cir. 1983).

This case presents what may be an unprecedented circumstance, as there is a very significant possibility that Congress will overturn all or part of the *Order* under review. This unique situation not only increases the likelihood that Petitioner will succeed in this litigation (in the sense that the requested relief will be obtained, albeit by legislation), but it also magnifies the likelihood that Petitioner will incur irreparable harm absent a stay.[2]

Even if this special consideration were ignored, it is clear that if the Court fails to issue a stay, massive consolidation of the broadcast industry will occur before judicial review can be completed. This will cause irreparable harm to Petitioner and to the American public, whose right to receive information is "paramount." *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 390 (1969). A number of parties to the proceeding below will undoubtedly seek agency reconsideration *see* 47 U.S.C. §405 (requiring some parties to exhaust administrative remedies), a process that generally takes many months. Since it could be many months or more before those administrative appeals are resolved, and because the FCC customarily asks appellate courts to hold their review in abeyance pending action on reconsideration, it is quite possible that in the absence of a stay, many applications for media mergers involving broadcast licenses will be approved under the new rules. These mergers, and the consequent restructuring of the communications media, will cause irreparable harm. It will not

[2]This motion is supported by the sworn Declaration of Pete Tri Dish, Ex. A hereto.

be possible to return to the *status quo,* even though Petitioner has a strong likelihood of ultimately prevailing on the merits.

STATEMENT OF THE CASE

Over the strong dissents of two of the five FCC Commissioners, the FCC has radically overhauled its ownership rules for broadcast stations. It acted pursuant to Section 202(h) of the Telecommunications Act of 1996, P.L. No. 104-104 ("1996 Act"), which requires the FCC to review all of its ownership rules biennially to "determine whether any of such rules are necessary in the public interest as the result of competition," and to "repeal or modify any such regulation it determines to be no longer in the public interest."

The agency sought comment on four broadcast ownership rules: the local TV multiple ownership rule (limiting how many stations one company may own in the one community); the radio-TV cross-ownership rule (similar), the national TV multiple ownership rule (limiting the total number of TV stations one company may own); and the dual network rule (limiting the operation of two national TV networks). *2002 Biennial Regulatory Review*, 17 FCC Rcd 18503 (2002). The FCC also incorporated pending proceedings on local radio ownership, *Rules and Policies Concerning Multiple Ownership of Radio Broadcast Stations in Local Markets*, 16 FCC Rcd 19861 (2001), *Definition of Radio Markets*, 15 FCC Rcd 25077 (2000), and the common ownership of broadcast properties and newspapers in the same community. *Cross-Ownership of*

Broadcast Stations and Newspapers, 16 FCC Rcd 17283 (2001). Although the FCC asked questions about the legal framework, the state of industry competition, whether the marketplace provides sufficient competition to advance the FCC policy goals, and how its rules might be modified, it did not present any new or substitute rules for public comment.

The FCC received well over 500,000 comments, *Order* n.1323, the vast majority of which opposed relaxation of the ownerships rules, Adelstein dissent at 4-5, Ex. 1D. Even so, the Commission majority nonetheless concluded that most of the existing rules are no longer necessary to achieve the Communications Act's basic goals of diversity, localism, and competition. Accordingly, in changes which will be effective on September 4, 2003,[3] the Commission substantially modified the rules as follows:

Local TV Rule: Traditionally, the local TV "duopoly" rule prohibited common ownership or control of ***two*** TV stations with overlapping signals. However, the FCC relaxed this rule in 1999. Specifically, the Commission permitted duopolies within a "Designated Market Area" ("DMA"), so long as at least one of the stations is not among the 4 highest-ranked stations, and at least 8 independently owned and operated

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[3]Pursuant to 47 USC § 310(d), no license may be transferred unless the FCC finds "that the public interest, convenience, and necessity will be served thereby." Interested parties, including viewers and listeners, may file petitions to deny the application. 47 U.S.C. § 309(d). If the Commission finds that "a substantial or material question of fact is presented or the Commission for any reason is unable to make the [requisite public interest] finding...," it must designate the application for a hearing. 47 U.S.C. § 310(e).

full power TV stations would remain. 47 C.F.R. §73.3555(b).

The *Order* further modified the rule to allow ownership of ***three*** TV stations in DMAs with 18 or more TV stations (regardless of whether any are commonly owned or operated) and common ownership of 2 TV stations in other DMAs, so long as both stations are not among the top-4 ranked stations.[4] *Order* ¶186.

National TV Rule. The Supreme Court upheld the FCC's prohibition on ownership of more than five TV stations in *U.S. v. Storer Broadcasting Co.*, 351 U.S. 192 (1956). As the number of stations increased, the FCC raised the station limit and added an alternative 25% audience reach limitation. Section 202(c) of the 1996 Act directed the FCC to delete numerical limits and raise the audience reach limit to 35%. The *Order* further increased the audience reach limitation to 45%. *Order* ¶499. At the same time, the FCC declined to repeal or modify the "UHF discount."[5] *Id.* ¶500

Cross-Ownership Rules: The newspaper-broadcast cross ownership rule was

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[4]This allows TV triopolies in 9 markets that collectively account for more than 25% of the population, and one or more duopolies in DMAs including over 95% of the population. Adelstein Dissent at 24. Moreover, the FCC substantially relaxed the standards under which it grants waivers to allow otherwise impermissible duopolies. *Order* ¶¶224-25 (eliminating requirement that waiver applicants demonstrate that they have tried and failed to secure an out-of-market purchaser).

[5]The UHF discount was adopted in 1985 to insure that the newly-adopted audience reach limit would reflect the fact that over-the-air UHF signals (channels 14-67) are generally weaker than VHF signals, and thus stations reached many fewer people over-the-air. *1985 Reconsideration Order*, 100 FCC2d 71, 93-94 (1985). Since 85% of viewers now receive programming *via* cable or satellite, many parties have argued that it is now obsolete. Retaining the UHF discount allows a single owner to reach up to 90% of households nationwide. Adelstein Dissent at 15.

adopted by the FCC in 1975 and upheld by the Supreme Court in *FCC v. NCCB,* 436 U.S. 775 (1978). It prohibits common control of a broadcast station serving the same area as a daily newspaper. The radio-TV cross ownership rule, which originally prohibited ownership of more than one TV, AM and FM station in a community, was amended in 1999 to permit common control of up to 2 TV stations and 6 radio stations depending on the number or remaining independent voices. 47 C.F.R. §73.3555(c).

The *Order* replaces these two rules with a Cross Media Limit ("CML") prohibiting newspaper broadcast combinations and radio/TV combinations only in DMAs with 3 or fewer TV stations. *Order* ¶454. The CML is derived from a new "Diversity Index," which supposedly identifies "at risk" markets using a modified version of the formula used by the DOJ/FTC to analyze mergers. *Id.* ¶429. The CML will allow newspaper TV combinations "in as many as 179 media markets across the country, where 97.7 percent of Americans live." Adelstein dissent at 15.

Local Radio Rule: The 1996 Act directed the FCC to establish four tiers of radio station ownership based on the size of a market. 1996 Act, §202(b)(1)(A).[6] Although the *Order* retained the current numerical limits, it nonetheless significantly eases their impact by changing how stations are counted. Specifically, the Commission now includes noncommercial stations (*i.e.*, religious, educational and other public radio

[6]For example, "in a radio market with 45 or more commercial radio stations, a party may own, operate, or control up to 8 commercial radio stations, not more than 5 of which are in the same service (AM or FM)." 1996 Act, §202(b)(1)(A).

stations) in the station count for each market. *See Order* ¶239.

ARGUMENT

This Circuit has generally adopted the stay criteria enunciated in *Virginia Petroleum Jobbers Ass'n v. FPC*, 259 F.2d 921 (D.C.Cir.1958):

> 1. Has the petitioner made a strong showing that it is likely to prevail on the merits of its appeal;
> 2. Has the petitioner shown that without such relief it will be irreparably harmed;
> 3. Would the issuance of the stay substantially harm other parties interested in the proceedings;
> 4. Where lies the public interest.

In re Penn Central Transportation Co., 457 F.2d 381, 384-385 (3d Cir. 1972); *see also Croskey Street Concerned Citizens v. Romney*, 459 F.2d 109, 111-112 (3d Cir. 1972) (Aldisert, J., concurring).

I. PETITIONER IS LIKELY TO PREVAIL ON THE MERITS.

There is an unusually high probability that some or all of the FCC's Order will be vacated by legislative or judicial action.

A. There Is a Very Strong Likelihood of Legislative Action to Overturn All or Part of the FCC's Order.

Expedited Congressional action now pending under the recently-enacted Congressional Review Act, 5 U.S.C. §§801-808, might well overturn the FCC's)action.[7]

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[7] As of August 12, 2003, S.J. Res 17 had 20 co-sponsors, and 35 Senators had signed a discharge petition, and Senators Lott and Dorgan have stated their intent to bring the matter to the floor of the Senate by mid-September. *See* Ex. D. If the Senate were to adopt S.J. Res 17, it would be considered by the House under expedited procedures

This appears to be a matter of first impression: Petitioner respectfully submits that the likelihood of action which partially or entirely vitiates an agency's aciton is effectively equivalent to a substantial likelihood of success on the merits from judicial review, and that this Court should grant relief if the other criteria justifying a stay are met.

The Congressional Review Act provides but one of several rapidly moving legislative vehicles to overrule the FCC's decision. On July 23, 2003, the House of Representatives voted 400-21 to stop the FCC from expending funds to raise the national TV audience limit. H.R. 2799, 108th Cong. (2003); this measure must, at the least, go to conference with the Senate. Moreover, it is clear the Senate is sympathetic to the measure; indeed, on June 19, 2003, the Senate Commerce Committee voted to approve a bill that would overturn the 45% national limit and the grandfathering of radio station combinations that violate the new rules, and restore the newspaper-broadcast rule. S. 1046, 108th Cong. (2003). A similar bill, H.R. 2052, 108th Cong. (2003), has been introduced in the House.[8]

B. **The *Order* is Arbitrary and Capricious**.

In addition to the likelihood of legislative action, if and when this Court considers the merits, Petitioner is likely to prevail.[9] Both dissents pointed out many ways

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set forth in 5 U.S.C. §802(f).

[8]As of August 12, 2003, S. 1046 had 44 co-sponsors, and H.R. 2052 had 176.

[9]Under 5 U.S.C. §706(2)(A), a reviewing court shall "hold unlawful and set aside agency action, findings, and conclusions found to be … arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." Among other things, the court

in which the *Order* is arbitrary and capricious. Copps dissent at 8-18; Adelstein dissent at 18-33. Below are just a few examples of the FCC's failure to consider the relevant factor or provide a reasoned explanation consistent with the record evidence.

1. The FCC fails to analyze how its new Cross Media Limit will affect competition in the market for local news.

The FCC finds that the record supports its traditional assumption of a link between ownership diversity and viewpoint diversity. *Id.* ¶27. It also finds that, in analyzing viewpoint diversity, it is appropriate to focus on diversity in local news, and that TV stations and daily newspapers are the sources used most often for local news. *Id.* ¶¶34-35, 342. Despite these findings, the FCC arbitrarily and capriciously fails to analyze the impact of newspaper-broadcast combinations on the delivery of local news, and instead, looks only at competition in the sale of advertising. *Id.* ¶¶331-41.

To the extent that the FCC addresses the impact of the new rules on news, it makes contradictory assertions. To justify common ownership of local TV stations, the FCC cites the high cost of producing local news. *Id.* ¶¶166-69. Yet, in developing the CML, it counts many media outlets that do not provide news because they "can rapidly expand their distribution of content (including local news and current affairs)

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assesses whether the FCC has examined the relevant data and articulated a rational connection between the facts found and the choices made, has failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, and whether the agency findings are supported by substantial evidence on the record. *Motor Vehicle Mftrs. Ass'n v. State Farm Mut. Auto Ins Co.*, 463 U.S. 29, 43-44 (1980).

at very low marginal cost." *Id.* ¶423. Again, this inconsistency renders the decision arbitrary and capricious.

2. The rules prohibit mergers among the top-4 ranked TV stations and top-4 networks yet allow mergers between the top ranked TV station and the only daily newspaper.

Another glaring inconsistency is the FCC's treatment of market power and audience shares. In keeping the top-4 restriction on local TV ownership as well as the dual network rule, the FCC concludes that dominant firms should not be allowed to merge with each other. The FCC identifies a host of dangers in such mergers including increase in economic market power, the creation of dominant firms that are much larger than their nearest rivals, the ability of such firms to distort the market for inputs available to other distributors of content, and reduced incentives to compete. *Id.* ¶¶195-200, 602-608. Furthermore, the FCC finds little public interest benefit from dominant firm mergers because the merging parties are likely to be healthy and already engaged in the production of news and information products. *Id.* ¶¶197-98, 611.

Every reason for prohibiting mergers between dominant entities in local TV markets also applies to mergers between dominant TV stations and daily newspapers. Yet, the FCC refused to consider actual market shares in developing the CML, *id.* ¶420, and the new rule permits mergers between a dominant TV station and the dominant newspaper in the majority of DMAs. The FCC's different treatment of market power in similar contexts is arbitrary and capricious.

3. The FCC counts UHF stations differently for purposes of the national TV limits and the local TV limits.

Another example of the FCC's use of contradictory assumptions in different parts of the *Order* concerns its treatment of UHF stations. The UHF discount, which allows TV station owners to exceed the 45% limit, attributes only 50% of such stations' audience. Although the FCC acknowledges that 86% of household receive both UHF and VHF TV by means of cable or satellite, it nevertheless retains the UHF discount on the basis that UHF stations have a smaller service area than VHF stations and it is harder for them to qualify for cable carriage and thus may be unavailable to homes that subscribe to cable. *Id*. ¶¶586-87.

In a clear self-contradiction, the FCC does not discount UHF stations for purposes of the local TV limits or CML. Instead, regardless of actual signal reach or audience rating, UHF stations are counted the same as VHF stations, because the FCC says that "[g]enerally, cable systems carry all broadcast stations assigned to the DMA in which they are located." ¶146. See also ¶187. Whether UHF stations are carried throughout a DMA is a factual question, but the FCC arbitrarily and capriciously assumes the facts to be whatever serves its purpose, even if those assumptions are diametrically opposed in different parts of the *Order*.[10]

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[10]Even one Commissioner voting with the majority recognized the irrationality of retaining the UHF discount, noting that the text of the *Order* was changed after its adoption to add "discussions further justifying…the disparate treatment of UHF stations in our local and national ownership rules." Ex. 1F.

4. Although the FCC purports to be maintaining existing limits, modifying the local radio rule to count noncommercial stations effectively raises the limits

The FCC also acts arbitrarily and capriciously in claiming to keep the local radio limits the same, while actually raising them. The current limits for local radio ownership reflect the tiered approach set for in the 1996 Act, where the number of radio stations that may be commonly owned depends upon the number of ***commercial*** radio stations in the markets. *See Order* ¶236. The FCC concludes that

> [a]lthough we reaffirm the ownership tiers in the local radio ownership rule, …it is not necessary in the public interest to exclude ***noncommercial*** radio stations in determining the size of the radio market.

Id. ¶295 (emphasis added). Because of the relatively large number of noncommercial radio stations, counting these stations for purposes of determining the cap has the effect of allowing additional common ownership in many markets.[11] The FCC's failure to recognize that including noncommercial stations effectively raises the cap or to examine the impact given record evidence that local radio is already excessively concentrated, *see, e.g.*, Copps dissent at 9, is yet another example of arbitrary and capricious decision making.

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[11]For example, because San Diego has 42 commercial radio stations, one company can control up to 7 radio stations. However, by counting the 12 noncommercial stations, the radio station cap increases to 8.

5. The FCC's decision to utilize bright line rules while refusing to consider challenges to transfers in compliance with the rules, violates the Communications Act.

The *Order* is not only arbitrary and capricious, but as Commissioner Adelstein points out in his dissent at 18:

> In its rigid insistence on fixed rules based on arbitrary methodologies, the *Order* subordinates our statutory obligation to serve the public interest, convenience, and necessity in favor of the convenience of those who seek to maximize the money they can extract from private sale of the exclusive right to use public airwaves. And it favors the Commission's administrative "convenience" ahead of the public interest.

This approach violates 47 U.S.C. §§309-310. *See* n. 2, *supra*.

The FCC admits that "bright line rules" "may be over-inclusive, by preventing transactions that would result in increased efficiencies, or under-inclusive, by allowing transactions that would raise concerns, if the circumstances of the case were reviewed." *Order* ¶84. Because the FCC recognizes that some transactions in violation of the rules may nonetheless serve the public interest, it commits to consider requests for waiver of its rules from applicants. *See, e.g., id.* ¶227. However, the FCC fails to ensure that the public interest is served where the rule is underinclusive by refusing to subject applications proposing transactions not barred by the CML to anything more than "routine Commission review," and refusing to consider how its "Diversity Index" applies to particular transactions. *Id.* ¶¶453, 481. Because the new rules will allow transactions contrary to the public interest, they contravene the Communications Act.

6. The FCC failed to provide adequate public notice under the APA.

The FCC's actions also violate the APA's requirement that an agency give public notice including "either the terms or substance of the proposed rule or a description of the subjects and issues involved." 5 U.S.C. §553(b). *American Iron and Steel Institute v. EPA*, 568 F.2d 284 (3rd Cir. 1977); *see also, Sprint Corp. v. FCC*, 315 F.3d 369 (D.C. Cir. 2003)(final rule must be "logical outgrowth" of version proposed). Reviewing courts will invalidate rules when an agency fails "to make its views known to the public in a concrete and focused form so as to make criticism or formulation of alternatives possible." *Home Box Office Inc. v. FCC*, 567 F.2d 9, 36 (D.C. Cir. 1977).

The FCC failed to provide adequate notice in a number of key respects. For example, as noted at pp. 6-7 above, it amended local radio rules to include noncommercial stations, yet none of the NPRMs indicated that the FCC was considering this significant change. In addition, "without more specific notice of the interrelated proposals…at no point was the public able to evaluate and comment on how these rule changes might work in concert." Adelstein dissent at 35. *See Complex Horsehead Resource Development Co. v. Browner*, 16 F.3d 1246, 1267 (D.C. Cir. 1994)("notice of individual parts of a proposed rule is not necessarily notice of the whole").

II. THE NEW BROADCAST OWNERSHIP REGULATIONS WILL CAUSE IRREPARABLE INJURY.

The new FCC regulations on their face permit substantial consolidation of broadcast ownership. Mergers and acquisitions will undoubtedly take place. This will diminish the diversity of viewpoints available to the public, reduce the number of sources of local news and public affairs, vastly increase the power of the national TV networks, further reduce opportunities for small businesses, local entities, minorities and women to own broadcast stations. Reduced competition will raise advertising rates and diminish innovation. Moreover, this harm is irreversible.

A. The New Rules Will Result in Substantial Consolidation.

The *Order* "allows the giant media companies to buy up the remaining local newspapers and exert massive influence over some communities by wielding three TV stations, eight radio stations, the cable operator, and the already monopolistic newspaper." Copps dissent at 3. Ex. 1E. TV networks will be able to control "up to an unbelievable 80 or 90 percent of the national television audience." [12] *Id.* Experience demonstrates that when rules are changed to permit greater concentration, such concentration is inevitable. The 1996 revisions to the local radio ownership rule resulted in "thousands of assignment and transfer or control applications" *Definition of Radio Markets*, 16 FCC Rcd 19861, 19869 (2001). Similarly, a FCC staff study found that while the number of commercial radio stations increased between the date the relaxed limits took effect and March 2002, the number of radio owners declined

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[12]The dissenters note that "[i]n California, one company could own 22 TV stations, major papers in Los Angeles, San Francisco, Sacramento, and Fresno, and numerous radio stations in every California DMA, as well as potentially, cable channels, local cable operators, and the dominant Internet [ISP]." Ex. B.

34%. (The report's summary is provided as Ex E. hereto.) There has been similar consolidation in TV.

After the FCC relaxed the restriction on TV duopolies in 1999, it soon approved numerous applications for mergers creating duopolies. Numerous temporary waivers have been granted to allow for orderly divestiture; these will become moot, allowing the parties to retain properties they had promised to sell.[13] There is every reason to believe that companies will quickly begin making acquisitions permitted under the new rules. Even before the rules were adopted, Merrill Lynch predicted that the new regulations would spur a "gold rush." and identified many potential buyers and sellers. Ex. F. Within a week after the FCC decision was announced, *Broadcasting and Cable Magazine* ("B&C") reported that several companies had already announced intended acquisitions, while many others were seeking to buy, sell or swap stations.[14] Ex. G.

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[13]*See, e.g., Shareholder of CBS Corp*., 15 FCC Rcd 8230, 8237 (2000) (approving duopolies in six markets and temporarily waiving national ownership limit); *UTV of San Francisco*, 16 FCC Rcd 14975, 14982 (2001) (approving duopolies in New York, Los Angeles, and Phoenix and temporarily waiving national TV limit as well as cross-ownership rule for New York); *Telemundo Communications Group*,17 FCC Rcd 6958 (2002) (approving TV duopolies in New York, Chicago, Dallas and Miami, and granting a temporary waiver to acquire a third station in Los Angeles).

[14]For example, Sinclair Broadcasting announced it would move immediately to acquire stations it was already operating under management contracts, and CBS was said to be talking to Raycom about buying its Cleveland duopoly, while Raycom has reportedly talked to LIN TV about the possibilities of a merger. CBS is also interested in buying TV stations owned by Meredith in Atlanta and Phoenix. The CEO of Paxson Communications, which could be purchased outright by investor NBC now that the 35% limit has been increased, claims to have had "inquiries about every one of his 60 owned TV stations." Fox is looking to "create duopolies where it doesn't have

B. Substantial Consolidation will Substantially Harm Petitioner

These acquisitions will substantially harm Petitioner, whose members are citizens as well as consumers and producers of public information. *See* Ex. A. As citizens, viewers and listeners, their First Amendment interest in "the widest possible dissemination of information from diverse and antagonistic sources" will be harmed by consolidation. *See FCC v. NCCB*, 436 U.S. 775, 785 (1978), *citing Associated Press v. U.S.*, 326 U.S. 1, 20 (1945). The combination of previously separate TV stations and of TV stations and newspapers will reduce the number of local news sources, and consequently the breadth of the stories covered and the number of different perspectives presented. Moreover, as large corporations buy local stations, they will become less responsive to the needs and interests of local citizens and communities. Petitioner's members will have fewer opportunities to hear the views of minorities and women, as it will be even more difficult for minorities and women to acquire and retain stations. Finally, the reduction in competition will result in lower quality programming for children as well as adults, less innovation, and increased advertising cost (which are passed on to consumers).

In addition, Prometheus members who are journalists and media workers will be harmed by the loss of jobs. The "efficiencies" of joint operations will make it more

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them," and Gannett Co. is expected to "take the lead among newspaper companies in seeking out and buying TV stations in markets where it owns papers." See Ex. G.

difficult to find positions and limit opportunities to exercise their First Amendment rights as speakers. Prometheus' institutional advocacy for expanded low power radio opportunities and other policies will also be impaired. Increased concentration will result in reduced coverage of issues and provide fewer opportunities to present their views to the public.

C. The Injury from Increased Consolidation is Irreparable

The injury from the new rules will be irreparable. As Commissioner Copps points out: "Given that [reconsideration] petitions are unlikely to be resolved for months, the impact of this decision by then will likely be irreversible." Copps dissent at 8. Similarly, Commissioner Adelstein observes that the relaxed rules are "likely to damage the media landscape for generations to come, as all of our experience tells us that the relentless waves of consolidation are virtually impossible to rollback once they advance." Adelstein dissent at 1.

Although the FCC has authority to condition merger approval on the outcome of an appeal, once a transaction has been consummated, it is effectively impossible to "undo" it. The original seller may have gone out of business or be unwilling or unable to reacquire the station. New buyers generally do not wish to undertake a deconsolidation. Moreover, the FCC has a long history of declining to require divestitures or enforce conditions.[15] Because the serious injuries from the media consolidation resulting from the new rules cannot be reversed, the court should stay the rules if it finds that Petitioner has some likelihood of success on the merits.

III. OTHER INTERESTED PARTIES WOULD NOT BE SUBSTANTIALLY HARMED IF A STAY WERE GRANTED

Granting a stay would not substantially harm any interested parties. Even industry commenters who support the new rules or seek even greater deregulation will be harmed because without a stay, they will expend huge amounts of money on acquisitions, negotiating deals and prosecuting their applications. The FCC will need to expend significant resources to handle these applications. Competitors and public interest groups will be forced to review applications and prepare Petitions to Deny, even though these challenges are unlikely to succeed.

Companies such as Viacom, NBC and Fox, which have temporary waivers to exceed the old rules, *see supra*, at p. 16,, should be able to have their waivers extended pending the outcome of the appeal, and any broadcast station that would likely fail if not acquired can obtain a waiver under the prior rules. *Id.* at ¶225.

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[15]For example, when the FCC adopted the newspaper-broadcast cross-ownership rules in 1975, it decided not to require divestiture except in the most egregious cases because of concern about "disruption for the industry and hardship for indi-vidual owners," *NCCB*, 436 U.S. at 787. *See also Regulations Governing Television Broadcasting*, 14 FCC Rcd 12903, 12961 ¶133 (1999), on recon., 16 FCC Rcd 1067 (2001) (grandfathering TV duopolies in violation of rules until at least the 2003 Biennial Review). Indeed, in this very proceeding, the FCC grandfathered existing combinations that violate the new rules. *Order* ¶484.

IV. GRANTING A STAY IS IN THE PUBLIC'S INTEREST

As Commissioner Copps points out, "every American has a stake in this decision…not just the companies that have temporary license to use the public's spectrum." Dissent at 2. Given this unprecedented public opposition and the far-reaching consequences of allowing the new rules to go into effect, a stay would clearly be in the public interest. A stay would also allow Congress time to address the FCC's decision.

CONCLUSION

For the foregoing reasons, the Court should stay the effective date of the FCC's new ownership rules and order that the prior ownership rules should remain in effect to preserve the *status quo* pending final resolution of this proceeding.

Respectfully submitted,

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August 13, 2003

CERTIFICATE OF SERVICE

I certify that on this 13th day of August, 2003, I served copies of the foregoing *Motion for Stay Pending Judicial Review* by causing them to be delivered by U.S. mail and by email (as indicated) to the following:

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